(27,025)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 939.

ROCK ISLAND, ARKANSAS AND LOUISIANA RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 15, 1919.

1 I. *Petition. Filed December* 15, 1915.

In the Court of Claims.

No. 33177.

ROCK ISLAND, ARKANSAS AND LOUISIANA RAILROAD COMPANY, a Corporation,

vs.

THE UNITED STATES OF AMERICA.

Petition.

To the Honorable Chief Justice and Associate Justices of the Court of Claims:

I.

Rock Island, Arkansas and Louisiana Railroad Company, petitioner herein, is, and at all times hereinafter mentioned was, a consolidated railway corporation, organized and existing under and by virtue of the laws of Arkansas and Louisiana, and owning a line of railroad in said states.

II.

On or about January 31, 1906, petitioner leased to The Chicago, Rock Island & Pacific Railway Company, a consolidated rail-
2 way corporation, organized and existing under and by virtue of the laws of Illinois and Iowa, for and during the term of nine hundred and ninety-nine (999) years, beginning January 31, 1906, all the lines of railway owned, leased or operated by it, and all of its other property, real, personal and mixed, of every nature and kind, including all appurtenances and fixtures thereto appertaining, which then belonged to or might thereafter be acquired by, your petitioner. Said lease contract is now, and at all times since January 31, 1906, has been, in full force and effect. Petitioner is not now, nor at any time during the year 1912 was it, in possession of, using or operating the said demised premises, but said demised premises now are, and at all times during the year 1912 were, in the possession of, and used and operated by, said The Chicago, Rock Island & Pacific Railway Company under the terms of the lease contract aforesaid.

III.

On or about February 27, 1913, pursuant to demand of the Collector of Internal Revenue of the First District of Illinois and in order

to avoid the imposition of penalties provided by law, petitioner, involuntarily and under protest, made a return of its annual net income for the year 1912. On June 1 1913, an internal revenue tax of Four Thousand, Two Hundred Eighty-five Dollars and Eighty-four Cents ($4,285.84) was assessed against petitioner under the provisions of Section 38 of the Act of Congress of August 5, 1909, entitled "An act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes." approved August 5, 1909. In accordance with the provisions of law and the regulations of the Secretary of the Treasury of the United States, on or about June 30, 1913, petitioner duly made an appeal to the Commissioner of Internal Revenue, praying an abatement of said assessment. On De-
3 cember 18, 1913, said petition was rejected by the Commissioner of Internal Revenue, and the abatement of such assessment refused.

IV.

On December 26, 1913, one S. M. Fitch was the duly appointed, qualified and acting Collector of Internal Revenue of the First District of Illinois, and on that day, to-wit: December 26, 1913, petitioner was forced to and did pay under protest to the said S. M. Fitch, as such collector, the sum of Four Thousand, Two Hundred Eighty-five Dollars and Eighty-four Cents ($4,285.84), together with the additional sum of Two Hundred Fourteen Dollars and Twenty-nine Cents ($214.29), as interest and penalty, making the total amount so paid by plaintiff Four Thousand Five Hundred Dollars and Thirteen Cents ($4,500.13). Payment of said sum was made involuntarily, under compulsion and protest, and in order to avoid the imposition of the penalties provided by the Act of Congress of August 5, 1909, hereinbefore referred to, and the seizure of petitioner's property to enforce the same, and petitioner then and there notified the said S. M. Fitch, as such collector that it considered said tax illegal and void, and that it would attempt to recover the same.

V.

Petitioner is not, nor at any time during the year 1912 was it, engaged in carrying on or doing business; nor at any time during said year was it engaged in carrying on or doing business within the meaning of the said Act of Congress of August 5, 1909. The assessment aforesaid was made illegally and without authority of law, and the amounts of the tax, penalty and interest and each of them, exacted from petitioner, as above set forth, were collected illegally and
4 without authority of law.

VI.

After the payment of said sum of Four Thousand Five Hundred Dollars and Thirteen Cents ($4,500.14) to S. M. Fitch, as Collector of Internal Revenue for the First District of Illinois, he paid the same over to the United States, defendant herein, which has since retained

and is now retaining the same. By reason thereof, the defendant is now indebted to petitioner in the sum of Four Thousand Five Hundred Dollars and Thirteen Cents ($4,500.13), together with interest thereon from December 26, 1913, until paid, at the rate of five per centum (5%) per annum.

VII.

Petitioner is justly entitled to the sum of Four Thousand Five Hundred Dollars and Thirteen Cents ($4,500.13), with interest thereon at the rate of five per centum (5%) per annum from the defendant, as alleged in paragraph VI hereof, after allowing all just credits and offsets. No action has been had on this claim in Congress or by any of the departments of the Government of the United States, except as hereinabove set forth; and no person or persons, other than petitioner, are owners thereof or in any manner interested therein, no assignment or transfer of this claim, or any part thereof or interest therein, having been made. Wherefore, petitioner demands judgment against the defendant for the said sum of Four Thousand Five Hundred Dollars and Thirteen Cents ($4,500.13), with interest thereon from December 26, 1913, at the rate of five per centum (5%) per annum.

ROCK ISLAND, ARKANSAS AND LOUISIANA RAILROAD COMPANY,
(Sgd.) By A. C. RIDGWAY, *Vice-President.*

5 STATE OF ILLINOIS,
County of Cook, ss:

Before me, Chas. Shostrom, a Notary Public in and for said County and State, appeared A. C. Ridgway, whose name is a part of the signature of the foregoing petition, and made oath on this 14th day of December, A. D. 1913, that the allegations of said petition are true to the best of his knowledge information and belief.

(Sgd.) A. C. RIDGWAY.

Subscribed and sworn to before me the day and year first above written.

[SEAL.] (Sgd.) CHAS. SHOSTROM,
Notary Public.

T. P. LITTLEPAGE,
Attorney for Petitioner,
605 *Union Trust Bldg., Washington, D. C.*
JOHN M. McLACHLEN,
Of Counsel.

6 II. *General Traverse.*

Court of Claims.

No. 33177.

ROCK ISLAND, ARKANSAS AND LOUISIANA RAILROAD COMPANY, a Corporation,

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On October 31, 1918 this case was argued and submitted on merits by Mr. Sidney F. Taliaferro, for the claimant, and by Mr. Charles H. Bradley, for the defendants.

7 IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J., Entered December* 2, 1918.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff, the Rock Island, Arkansas & Louisiana Railroad Company, is, and at all times hereinafter mentioned was, a consolidated railway corporation, organized and existing under and by virtue of the laws of the States of Arkansas and Louisiana pursuant to articles of agreement dated October 31, 1905, between the Arkansas Southern Railroad Company, Arkansas Southern Extension Railway Company, and Little Rock and Southern Railroad Company, and owns a line of railroads in said States.

It was declared in the articles of agreement to be the general objects and purposes for which the consolidated company was established and the nature of the business to be carried on by it that it should own, maintain, operate, improve, and develop the constructed lines of railroads of the three constituent companies and to construct, or cause to be constructed, or to otherwise acquire and maintain certain designated lines of railroad, and to lease or to sell the lines of railroad of the consolidated company in whole or in part to other companies and to lease or to purchase the railroads, appurtenances

and franchises of any other railroad corporation, in whole or in part; to consolidate with any other railroad corporation or corporations; to hold, sell, and transfer the stocks, bonds, and securities of any other railroad corporation; to guarantee the stocks, bonds, and securities of any other railroad or terminal corporation; to construct and operate steamships and other vessels to carry freight and passengers for hire; to construct, own, and operate docks and wharves, and to possess, enjoy and exercise all powers and privileges incidental to each and all of the objects and purposes set forth in the agreement. The corporate existence of the consolidated company was limited to the term of 99 years from the date of consolidation unless extended in accordance with law.

8 II.

Under date of January 31, 1906, the plaintiff executed a written lease whereby it leased to the Chicago, Rock Island & Pacific Railway Co., for and during the term of 999 years, beginning on the said date, its lines of roads. The said written lease is as follows:

"Whereas the lessor is a consolidated corporation organized and existing under the laws of the States of Arkansas and Louisiana, and owns and operates lines of railway in the States of Arkansas and Louisiana; and

"Whereas the lessee is a consolidated corporation organized and existing under the laws of the States of Illinois and Iowa, and owns and operates lines of railway in said States and in the States of Missouri, Nebraska, Kansas, and Colorado, and in the Indian Territory and the Territory of Oklahoma, and operates in the State of Arkansas a line of railway which so connects with the line of railway of the lessor as to practically form a continuous line of railroad; and

"Whereas the said lines of railway of the lessor and of the lessee connect at Haskell, Saline County, Arkansas, and are connecting and continuous railways:

"Now, therefore, this indenture witnesseth:

"First. The lessor, for and in consideration of the covenants and agreements hereinafter contained, on the part of the lessee to be observed, kept, and performed, has let, leased, and demised, and by these presents does let, lease, and demise, to the lessee, its successors and assigns:

"First. The following lines of railway of the lessor, viz:

"1. From Haskell, Arkansas, to Eldorado, Arkansas.

"2. From a point upon said Haskell-Eldorado line at or near Summerville, Arkansas, to Crossett, Arkansas.

"3. From Eldorado, Arkansas, by way of Ruston, Louisiana, and Winnfield, Louisiana, to the southern boundary of Winn Parish, Louisiana.

"4. From Cornie Junction, Arkansas, to Wesson, Arkansas.

"Second. The following lines of railway, when and as constructed or acquired by the lessor, viz:

"1. From a point upon said Haskell-Eldorado line to Malvern, Arkansas.

"2. From Haskell, Arkansas, to Little Rock, Arkansas.

"3. From a point at or near Junction City, Louisiana, to Shreveport, Louisiana.

"4. From a point at or near the southern boundary of Winn Parish, Louisiana, to Alexandria, Louisiana.

"5. From said Alexandria, Louisiana, southward to the Gulf of Mexico.

"6. From said Alexandria, Louisiana, westward or southwestward to the western boundary of the State of Louisiana.

"7. From said Alexandria, Louisiana, to a point upon the Mississippi River at or near the city of Baton Rouge, Louisiana, or the city of New Orleans, Louisiana, or upon said river between Baton Rouge, Louisiana, and New Orleans, Louisiana.

9 "And all other lines of railway owned, leased, or operated by the lessor at the time of the execution and delivery of this indenture, or at any time during the term thereof, including spurs and branches to lumber mills, cotton compresses, and industries, and all right, title, and interest now or at any time during the term hereof held by the lessor in and to any other lines of railway in which the lessor, by lease, trackage agreement, or operating contract, has any right, title, or interest; all rights of way, stations, depot and terminal grounds, and all other lands and interests in land appertaining or to appertain to said lines of railway and each of them; all roadbeds, tracks, sidings, rails, ties, switches, bridges, piers, abutments, trestles, viaducts, culverts, turnouts, turntables, superstructures, fences, stations warehouses, elevators, water stations, telegraph lines, and all other buildings, erections, fixtures, appliances, and facilities now owned or hereafter to be acquired by the lessor or hereafter added to said railways or any of them; all rolling stock and equipment of every description, including locomotives, cars, and vehicles of every kind now owned or possessed, or which may hereafter during the term be acquired by the lessor; all tools, implements, and machinery, instruments, furniture, safes, books, accounts and bills receivable, cash on hand, stocks, bonds, maps, field notes, surveys, charts, materials, supplies, personal property, and claims or causes of action of every character now or hereafter during the term belonging or accruing to the lessor; together with all and singular the property, rights, privileges, franchises, tenements, hereditaments, and appurtenances to the said railways and each of them belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the lessor of, in, and to the same, and every part and parcel thereof, with the appurtenances, whether now held or hereafter acquired.

"To have and to hold unto the lessee, its successors and assigns, for a term of nine hundred and ninety-nine (999) years beginning on the date hereof;

"Subject, however, as to a portion of the property embraced therein, to the lien thereon of the first mortgage of Rock Island, Arkansas and Louisiana Railroad Company to the Bankers' Trust

Company, of New York, as trustee, dated January 1, 1906, securing an issue of four per cent first mortgage fifty-year gold bonds maturing January 1, 1956, authorized to be issued to an aggregate face amount of $15,000,000 of which $7,500,000 are now issued and outstanding.

"The lessee, its successors and assigns, yielding and paying therefor the sums hereinafter specified and keeping and performing all and singular the covenants and agreements hereinafter set forth to be by the lessee observed, kept, and performed.

"Second. The lessee agrees to account to the lessor for all operations of the demised railways until midnight of January 31, 1906, and does hereby assume the payment of all current and unsecured indebtedness of the lessor as of February 1, 1906; in consideration thereof the lessor does hereby irrevocably authorize the lessee throughout the term of this lease to exercise in respect of all stocks and bonds at any time during the term owned by the lessor all rights, powers, and discretions which the lessor as such owner might or could exercise, including the right to sell, pledge, or otherwise dispose of the same, and to devote the proceeds thereof to its own use, and to exercise such rights, powers, and discretions in the name of the lessor or in the name of the lessee; the lessor hereby irrevocably constituting the lessee, during the term of this lease, its lawful attorney, with full power of substitution and revocation, in the name and stead of the lessor, to execute and deliver all such instruments, proxies, and powers as may, in the judgment of the lessee, be necessary or proper, and the lessor hereby ratifies and confirms all action which the lessee or any substitute may take or cause to be taken by virtue hereof. The lessor does further irrevocably authorize the lessee throughout the term of this lease to collect in the name of the lessor or otherwise and to retain for its own use the interest on the bonds or other indebtedness, if any, from time to time during the term held by the lessor or to which the lessor may be or during the term become in any manner entitled, and the dividends on all stocks, if any, from time to time during the term held by the lessor, or to which the lessor may be in any manner entitled, and the lessor will, at the request of the lessee, collect and forthwith pay over to the lessee all such interest and dividends.

"Third. The lessee, in consideration of the premises, accepts under the provisions hereof the premises and property hereby demised for the term hereby granted, and covenants to and with the lessor to pay yearly and every year during the term hereby granted, by way of rental therefor, the sum of the following amounts:

"(*a*) Such a sum of money, not to exceed five hundred dollars ($500) per annum, as shall be requisite to maintain, renew, and keep up during the term of this lease the corporate existence and organization of the lessor.

"(*b*) All taxes that may be imposed, assessed, or levied upon the lessor or upon the demised premises and property, or any part thereof or upon the earnings thereof, as the same shall become due and payable.

"(*c*) All rentals or other compensations, if any, due or owing by

the lessor under or by virtue of the provisions of any lease, trackage arrangement, or operating contract under and by virtue of which the lessor has the right to use the railway or any part thereof of any other railway company.

"(*d*) An amount equal to the interest accruing on the said four per cent first mortgage fifty-year gold bonds of the lessor now outstanding, and on all of such bonds hereafter issued by the lessor at the request or with the consent of the lessee; such payments to be made by payment of said interest as it accrues to the holders of said bonds in accordance with the terms thereof and of the mortgage or deed of trust securing the same.

"(*e*) An amount equal to the balance of the net earnings of the lines of railroad of the lessor, after the payment, out of the gross earnings thereof, of the aforesaid amounts enumerated in the foregoing paragraphs (*a*), (*b*), (*c*), and (*d*) of this third article, and also of operating expenses and expenditures for such additional equipment, motive power, additions, improvements and betterments to or
11 *open* the lines of railroad of the lessor as in the judgment of the lessee shall be essentail or convenient for the due and proper operation, maintenance, repairs, and renewals thereof.

"Fourth. The lessee covenants to and with the lessor as follows:

"The lessee shall and will save harmless and indemnify the lessor from and against all causes of action, legal or equitable, arising by reason of the acts or neglect of the lessee, or of the failure by the lessee or any of its officers, agents, or employees to fulfill any duty toward the lessor or toward the public or any person or persons whomsoever, which the lessor by reason of its ownership, or the lessee by reason of its occupancy of the demised premises, or otherwise, may owe; and shall and will at its own cost and expense defend such actions which may be brought against the lessor, and shall pay all amounts which may be recovered therein against the lessor for or upon the said causes of action.

"The lessee will, during the term of this lease, keep and maintain the demised lines of railway of the lessor in good and proper condition for the passage thereover of both freight and passenger traffic, and shall and will keep and maintain in good repair, working order, and condition the tracks, depots, terminal facilities, and other demised property, using suitable materials for renewal of the same as renewal shall from time to time become necessary.

"Fifth. The lessor covenants to and with the lessee as follows:

"The lessor shall and will maintain, renew, and keep up during the term of this lease its corporate existence and organization so long as permitted by law so to do, and at all times and from time to time during said term, when requested by the lessee, shall and will put forth and exercise each and every corporate power and do each and every corporate act which the lessor now or at any time hereafter may lawfully put in force or existence, to enable the lessee to enjoy and avail itself of and exercise every right, franchise, and privilege hereby granted and the proper operation and management of the demised premises according to the terms of this lease, and shall not and will not commit or omit, or suffer or allow to be committed or

omitted, any act whereby its corporate existence or powers may be annulled, abridged, or affected.

"The lessor shall and will from time to time and at all times hereafter, at the request of the lessee, make, execute, and deliver all such other and further instruments and assurances in the law for the better or more particular assuring of the demised premises upon the conditions aforesaid, according to the true intent and meaning of these presents, as by the lessee shall be reasonably advised or required.

"Sixth. It is mutually covenanted as follows:

"The lessee shall and will, at the determination of this lease, redeliver and surrender up to the lessor the demised premises and property in good order and condition, ordinary wear and tear excepted, with such additions, alterations, and improvement as shall have been made thereto, subject, however, to any then existing encumbrances created by the lessor or by the lessee upon the demised premises or any part thereof, or upon the lessee's interest therein, and upon payment by the lessor to the lessee of the then value, over and above any and all such encumbrances, of all such additions, alterations, and improvements, including equipment.

12 "If the lessee shall, at any time or times hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of three (3) months, or shall fail punctually and faithfully to observe, keep, and perform any other of the covenants and agreements thereof, and such default shall continue for the space of three (3) months after service by the president of the lessor upon the president of the lessee of a written notice specifying such default and requiring the lessee to remedy the same, then, and in either of such cases, the lessor may at any time, either—

"(*a*) Proceed by proper action or actions in the proper courts, either at law or in equity, to enforce performance of such covenants by the lessee or to recover damages for the breach thereof; or

"(*b*) By notice in writing determine this lease, and thereupon enter into and upon the demised property, and shall thenceforth hold, possess, and enjoy the same free from any right of the lessee, or its successors or assigns, to use the demised premises for any purposes whatever; and thereupon any right, title, and interest of the lessee to the use of the demised premises shall absolutely cease and determine as though this lease had never been made; but the lessor shall, nevertheless, have the right to recover from the lessee any and all amounts which under the terms hereof may be then due and unpaid for the use of the demised premises.

"At any sale under foreclosure of this lease and of the rights, privileges, and property of the lessee under this lease in pursuance of any of its provisions the lessor shall have the right to become the purchaser thereof free and discharged from all equity of redemption on the part of the lessee and from any and all claims of the lessee therein and thereto.

"In no event shall the stockholders of the lessee or of the lessor be held to any individual liability as stockholders for any default,

damages, or other breach of obligation, whether of this lease or of any instrument made in pursuance thereof by either party thereto.

"Nothing contained in this indenture shall prevent the consolidation or merger with or sale to the lessee of the railways and property of the lessor or of any other railway company, or any consolidation or merger of the lessee with any other corporation, or any conveyance, mortgage, transfer, or lease by the lessee of its property, including its leasehold interest in the demised premises.

"This indenture is also subject to termination in accordance with the provisions of section 1 of article twelve of said first mortgage, dated January 1, 1906, made by the lessor to Bankers Trust Company, as trustee, as follows, viz:

"(*a*) This indenture is subject to termination by the lessor or by said Bankers Trust Company, trustee, in case of the happening of any of the events of default described in section 2 of article five of said first mortgage; and (*b*) this indenture is subject to termination by the purchaser at any sale of the railroads and properties of the lessor made in enforcement of the terms and provisions of said first mortgage. Said section 1 of article twelve of said first mortgage is hereby made a part of this indenture.

"Seventh. Nothing in this indenture expressed or implied is intended or shall be construed to confer or to give to any person or corporation, other than the parties hereto, any right, remedy, or
13 claim under or by reason of this indenture, or of any covenant, condition, or stipulation thereof; and all the covenants, stipulations, promises, and agreements in this indenture contained shall be for the sole and exclusive benefit of the parties hereto.

"Eighth. All the covenants, stipulations, and agreements in this indenture shall extend to and bind the successors and assigns of the parties, respectively, by and to whom the same have been made.

"In witness whereof each of the parties hereto has caused its corporate seal to be hereunto affixed and this lease to be signed by its president or vice president and its secretary or assistant secretary as of the day and year first above written."

III.

The said Rock Island, Arkansas and Louisiana Railroad Company, did not, at any time during the year 1912, exercise its power of eminent domain, or put in force any other general or special corporate power vested in it, or in the transaction of any other business whatever, for the doing of which it was primarily incorporated, organized or authorized except only the following:

During the year 1912 plaintiff company maintained offices in the cities of Chicago, State of Illinois; Ruston, Lincoln Parish, State of Louisiana, and Little Rock, State of Arkansas; held stockholders' and directors' meetings and elected officers, which officers of said company performed all the acts and functions usually and commonly delegated to and required of officers of railway companies in a situation analogous to that of plaintiff company.

On the 4th day of October, 1912, the said Rock Island, Arkansas and Louisiana Railroad Company, by the consideration and judgment of the Circuit Court of Union County, Arkansas, did recover from J. Ross Morgan the sum of $213.90 in an action theretofore instituted, based upon a covenant of warranty.

On the 17th day of October, 1912, the said Little Rock, Arkansas and Louisiana Railroad Company did institute in the District Court of the Twenty-second Judicial District of Louisiana, for the parish of East Baton Rouge, an action against the Board of Appraisers of the State of Louisiana, seeking the cancellation of certain tax assessments against the property of said company, said cause being finally determined on the 7th day of July, 1913.

During the year 1912 the Rock Island, Arkansas and Louisiana Railroad Company purchased the railway lines of the Little Rock and Hot Springs Western Railroad Company; at and for the stipulated price of $453,600, for which amount it issued its promissory notes, thus increasing its indebtedness from $11,000,000, as shown in its report for the year 1911, to $11,453,600, as shown in its report for the year 1912.

IV.

In May, 1913, an internal revenue tax of $4,285.84 was assessed against plaintiff under the provisions of section 38 of the act of August 5, 1909, entitled "An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909.

14 On June 30, 1913, the plaintiff's president, acting for it, prepared and on or before July 14, 1913, caused to be filed in the collector's office for the first district of Illinois, a claim for an abatement of said assessment, which was duly transmitted to the Commissioner of Internal Revenue at Washington on the 16th day of July, 1913. The plaintiff used Form 47 for said purpose, which had the following caption:

"Form 47. Revised January, 1900.

"United States Internal Revenue.

"Claim under Series 7, No. 14, for revision of taxes abatable under sec. 3220 or sec. 3221, R. S., or sec. 6, act of March 1, 1879, as amended."

Following said caption is the claim in the form of an affidavit by plaintiff's president stating that the plaintiff was not engaged in the business of a common carrier but that in the month of May, 1913, it was assessed an internal-revenue tax of $4,285.84 upon its net income, which assessment of the tax should, as deponent believed, be abated, in part or in whole, for the following reasons, namely: "That Rock Island, Arkansas and Louisiana Railroad Company is not an active corporation, being a company that is not engaged in business, except the business of owning property, maintaining investments, etc., that it has no income. It is exempt from taxation under the decision in the case of McCoach versus the Minehill and Schuylkill Haven Railroad Company and is therefore entitled to abatement of the excise

taxes assessed for the year 1912." The claim was that for reasons above stated the plaintiff was justly entitled to have $4,285.84 of the aforesaid assessment remitted, and it therefore asked and demanded the same.

Under date of December 18, 1913, the Commissioner of Internal Revenue rejected the application.

V.

The Secretary of the Treasury prescribed and promulgated certain regulations on September 26, 1889, known as "Regulations No. 14, revised," which provided in part as follows:

"Claims for credit on account of erroneous or illegal assessments are under remedial acts and so must be made out upon Form 47 and must be sustained by the affidavits of the parties against whom the taxes were assessed, or of other parties cognizant of the facts, and must be accompanied by affidavits of the deputy collectors of the divisions in which the claims arise. * * *

"But if the deputy collector has reason to doubt the correctness of the statements made by a claimant he should modify his affidavit accordingly, a space being left for that purpose at the close of the affidavit. If he has not investigated all the facts he should state in the blank space left in the body of the affidavit for that purpose what facts he has not investigated.

"If there are any objections to a claim the collector should be careful to state them fully in a certificate to be attached to and made part of the claim. In some cases where the collector has certified to the correctness of claims, the deputy collector makes exceptions to the facts as stated by the claimants. Unless the collector makes a special explanation in every such case the claim will be returned for such explanation.

"The claim should be still further supported by a certificate of the collector showing the list, page, and line of all assessments therein referred to, not only of the assessment of the tax for the abatement of which the claim is filed, but also of each and every other assessment mentioned in the voucher. Even where only a portion of a tax is claimed as erroneous the collector should be careful to certify the full amount assessed. * * *

"When a tax has been assessed and turned over to the collector, the presumption is that the assessment is correct. The burden of proof in rebutting that presumption, and showing that it was improperly or illegally assessed, or that relief should be given under a remedial statute, rests upon the applicant for abatement. The affidavits must, therefore, contain full and explicit statements of all the material facts relating to the claims in support of which they are offered, and which are essential to their proper consideration. Nothing should be left to mere inference, but all the facts relied upon should appear on the papers themselves. It is only the correctness of the statement of facts to which the deputy collector certifies, not the legality of the claim. The legality of the claim is to be deter-

mined by the Commissioner of Internal Revenue upon the facts presented and proved by the affidavits. * * *

"The filing of a claim for the abatement of a tax alleged to have been erroneously assessed does not operate as a suspension of the collection of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if necessary, collect the tax, and leave the taxpayer to his remedy by claim on Form 46.

"Form 46.

"Claims for the refunding of taxes and penalties must be made out upon Form 46. In this case, as in that of claims for abatement upon Form 47, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. The claim should be still further supported by an affidavit of the deputy collector of the proper division, and by the certificate of the collector. * * *

"But if the deputy collector has reason to doubt the correctness of the statements made by a claimant, he should modify his affidavit accordingly, a space being left for that purpose at the close of the affidavit. If he has not investigated all the facts, he should state in the blank space left in the body of the affidavit for that purpose what facts he has not investigated."

VI.

On December 26, 1913, the plaintiff company paid to S. M. Fitch, collector of internal revenue for the first district of Illinois, the said sum of $4,285.84, together with the additional sum of $214.29 as interest and penalty, making the total amount so paid by plaintiff company $4,500.13. In the ordinary course of business the
16 said collector of internal revenue and paid over to the United States the said total sum of $4,500.13, which total sum has, ever since, been and is now retained by the United States.

VII.

After the payment of said tax, interest, and penalty the plaintiff took no other steps or proceedings before the Commissioner of Internal Revenue looking to a refund of the tax or the payment back thereof to the plaintiff.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition herein should be, and the same is hereby, dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the chief clerk and collected according to law.

CAMPBELL, *Chief Justice*, delivered the opinion of the court.

The plaintiff filed a petition in this court claiming the sum of $4,500.13, which, it is alleged, the plaintiff was illegally or wrongfully required to pay to the collector of internal revenue as an excise tax, with interest and penalty thereon, under the provisions of the act of August 5, 1909 (36 Stat., 112).

The facts show that the tax was assessed against plaintiff in May, 1913, for the doing of corporate business during the year 1912. In July, 1913, the plaintiff applied to the Commissioner of Internal Revenue for an abatement of the tax, which application was denied in December, 1913. Shortly thereafter the tax was paid. After making the payment the plaintiff did not present an appeal to the Commissioner for a refund of the tax, but brought its action in this court on the 15th day of December, 1915.

While contending that the plaintiff was liable to the tax and the collection was lawful, the defendant insists (1) that it is not shown that the tax was paid involuntarily or under protest, and (2) that the failure to present an appeal to the commissioner after payment for a refund of the tax is fatal to any right to maintain the action in this court. This last question is a material one in the present case and may be a recurring one in this court, involving, as it does, a condition under which actions of this kind are maintainable in the Court of Claims.

It is to be kept in mind that the Government can not be sued except by its consent.

The applicable statutes authorizing the remission, refund, and repayment of internal revenue taxes constitute sections 3220 et seq. of the Revised Statutes. The purpose of these sections is to afford a system of corrective justice whereby the taxpayer may secure relief, but when we look to them alone we do not find that they give a right of action against the Government. In some of their features there is a recognition of the right to sue the collector, while other features are applicable to [illegible] in any court. But the remedy which they afford would be exclusive so far as concerns direct action against the Government, were it not for the fact that the Court of Claims is
17 authorized to hear and determine claims founded upon any law of Congress. That power was a part of the jurisdiction conferred upon the court by the act creating it, in 1855, was carried into the Tucker Act of 1887, and into section 145 of the Judicial Code. The ground for jurisdiction in cases like the present one has been frequently stated by this court, and is carefully examined in Judge Sanborn's opinion in Christie-Street Commission Co. v. United States, 136 Fed., 326. There seems to have been for a long time some question as to whether or not the sole remedy of the aggrieved party was not an action against the collector, but that question is no longer an open one. In United States v. Emery, 237 U. S., 28, in an opinion by Mr. Justice Holmes, it is said, in answer to the Government's contention that the only remedy was a suit against the collector, that "the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims." The taxes sought

to be recovered in that case were assessed under the said act of 1909, and the court's jurisdiction to hear and determine the claim was sustained because it was held that the claim was founded upon a law of Congress. Hvoslef Case, 237 U. S., 1, 10.

Section 3220 authorizes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, "on appeal to him made," to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount or in any manner wrongfully collected. Regulations have been prescribed by the Secretary and they have the force of law. Stotesbury case, 23 C. Cls., 285, affirmed in 146 U. S., 196. These regulations provide for an application to abate the tax, in part or in whole, the form to be used for that purpose being designated as Form 47. They also provide for applications under Form 46, where a refund of the tax is sought. Inasmuch as the statute authorizes the commissioner to "remit" the tax, it may be assumed that the regulations providing for an application to abate the tax find sufficient support in the authority granted to remit. No remedy, however, is provided in the event the commissioner erroneously refuses to remit or abate the tax. Section 3224 provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The party assessed must accordingly pay the tax, and he may then appeal to the commissioner for the refunding of it. The statutes provide a system and regulate the procedure to be taken. The initial step after payment is an appeal for the refund, and the commissioner is clothed with full authority to grant the relief. He may not only decide that the applicant is entitled to have the money paid back to him, but he is authorized, out of a permanent appropriation provided for the purpose, to make repayment. (Sec. 3689.) It may be observed that this power to effectuate the commissioner's decision by payment without awaiting further appropriations by Congress is broader than the statutes, as they now exist, confer upon the Court of Claims, because the court's judgments must await congressional appropriation before they can be satisfied. The statute thus creates a tribunal with full authority to investigate and pass upon the questions involved and requires an appeal to that tribunal in the first instance. By section 3226 suit in any court to recover the taxes is forbidden until the commissioner has been appealed to and
18 has rendered his decision on the appeal. Section 3227 forbids suit unless brought "within two years next after the cause of action accrued," and (within the same period) section 3228 requires that all claims for a refunding of the tax shall be presented to the Commissioner of Internal Revenue. There is a proviso to section 3226 providing that if the commissioner's decision on the appeal is delayed for more than six months "from the date of such appeal," suit may be brought without first having his decision at any time within the period limited by section 3227, which, as has been said, is "within two years next after the cause of action accrued." The "appeal" mentioned in section 3326, which the commissioner must pass upon, is an appeal for the refunding of the tax, and, similarly, the expression

"such appeal" in the proviso refers to the appeal to refund. Reading the several sections together, we find that section 3220 authorizes the commissioner to refund certain taxes on timely appeal to him therefor, while section 3226 forbids suit in any court until such appeal has been filed and the commissioner's decision therein made, or until his decision has been delayed for at least six months. This statutory plan looking to the refuding of the taxes erroneously or illegally collected is designed to be simple, direct, and expeditious. But appeal for a refund to the statutory tribunal authorized to make it is essential. There can not be an appeal for a refund before the tax is paid, nor does any cause of action accrue until payment of the tax.

Nor does the required appeal invoke a mere ministerial function. In United States v. Savings Bank, 104 U. S., 728, the Supreme Court held that the powers of the commissioner under section 3220 were not materially different from the powers granted by section 3426, construed in Kaufman's case, 96 U. S., 567, and said:

"An allowance by the commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress. Until an appeal is taken to the commissioner no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid."

In Lauer's case, 5 C. Cls., 447, decided at the December term, 1869, the petition was dismissed because the record failed to show that a decision of the commissioner had been made upon appeal for a refund. Similar action was taken in Salisbury's case, 23 C. Cls., 285, affirmed in 146 U. S., 196. The appeal is from the collector's action to a tribunal fully authorized to grant relief.

In Stewart v. Barnes, 153 U. S., 456, the court considered the original act from which sections 3226 and 3227 were taken, and said:

"Under either of those acts before an action could be maintained in any court an appeal must first have been made to the commissioner."

Attention was called to the act of 1872, under which, if the commissioner delayed his decision for more than six months, "the claimant was not compelled to await it, but might have sued within six months next following the six months of the commissioner's delay, or one year from the time of appeal." In Chesebrough's case, which was a suit against the United States (192 U. S., 253, 262), it is said:

"In Stewart v. Barnes, 153 U. S., 456, this court treated the language as providing for 'an appeal,' and we think correctly." And, further, it is said:

19 "This petition did not set up any ruling of the collector, either specific or resulting from a demand to which petitioner yielded under protest or with notice, and from which he appealed to the commissioner, but averred that he 'made a written application' to the commissioner to refund the amount he had paid.

"We do not say that this was not sufficient to justify action by the commissioner, but the averment as it stands is not equivalent to stating a previous adverse decision appealed from."

But while section 3220 imposes a duty upon the commissioner to refund the tax on timely appeal when under the law it should be

refunded, we do not find in that, or in the succeeding section, any authority to sue the United States in case of the commissioner's erroneous refusal or failure to order the refund. Of course, if his action is favorbale upon the appeal, there is no occasion for further remedy; but if his action be unfavorable and erroneous, the party seeking the refu d would be remitted to his action against the collector but for the statute authorizing suits in this court for claims founded upon any law of Congress. The reasoning of the court in Medbury's case, 173 U. S., 492, 497, is applicable here:

"The statute creates the right to have repayment under the facts therein stated, but it gives no remedy for a refusal on the part of the Secretary to comply with its provisions. The person has the right under the act to obtain a warrant from the Secretary of the Interior for the repayment of the excess therein mentioned, and for the purpose of obtaining it he must make his application and prove the facts which the statute provides, and then the Secretary is to draw his warrant on the Treasury. This constitutes the right of the appellant. Applying for a warrant is not a remedy. When application for repayment is made there is nothing to remedy. He has not been wronged. A right of repayment of money theretofore paid has been given by the act, but it is only under the act that the right exists, and that right is to have the Secretary in a proper case issue his warrant in payment of the claim, and until he refuses to do so, no wrong is done and no case for a remedy is presented. After the refusal, the question then arises as to the remedy, and you look in vain for any in the act itself. We can not suppose that Congress intended in such case to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the Court of Claims, for none is given in the act which creates the right. The procedure for obtaining the repayment as provided for in the act must be followed, and when the application is erroneously refused, the party wronged has his remedy, but that remedy is not furnished by the same statute which gives him the right."

Seeking to found its claim upon a law of Congress, it is necessary that the plaintiff show a compliance with that law. What the plaintiff in the instant case did was to apply to the commissioner for an abatement of the assessment, using for that purpose Form 47 prescribed by the regulation. That application was rejected. Thereafter the plaintiff paid the tax to the collector, and without securing a decision by the commissioner upon an appeal for a refund, and without invoking any action by him after payment, action was brought in this court nearly two years after the payment of the tax.

The regulations prescribed by the Secretary provide for an ap-
20 peal for a refund of the tax, and the use therefor of Form 43.

The plaintiff, however, insists that the application for an abatement of the tax made and acted upon before payment met all the requirements of the statute in the matter of appeal to the commissioner, and he cites several cases in support of that position. San Francisco & Loan Society v. Cary, 2 Sawy., 333; Schwartzchild v. Rucker, 143 Fed., 656; Weaver v. Ewers, 195 Fed., 247; and De Bary v. Dunne, 162 Fed., 961. These were suits against collectors, and the opinions

in the cases considered section 3226 in its bearing upon the suits in question. They do not refer to section 3220 in its connection with section 3226, nor in its relation to a suit against the United States. We are not concerned with what the rule shall be in suits against the collector, except as the rule may affect suits against the United States. These cases hold, however, that where it appeared that the taxpayer had applied to the commissioner for an abatement of the assessment and his application had been refused, he could bring suit against the collector after paying the tax without appealing to the commissioner for a refund of it. The reason for that conclusion as given in one of the cases is: "If the commissioner considers the matter on its merits on an application for an abatement of tax before payment, and decides that the tax has been properly assessed and should be collected, there could hardly be any necessity for appealing to him to refund it." The necessity, however, for an appeal for a refund or the payment back of the tax is found in the fact that without it the plaintiff does not show a claim founded upon a law of Congress. It is section 3220 which gives recognition to the commissioner's duty to refund "on appeal to him made," and it is compliance with that section which plaintiff must show, as well as an observance of section 3226 and the prescribed limitations.

In another of the cases mentioned (162 Fed., 961, 965) it is said: "Although the statute requires that there shall be an appeal taken to the Commissioner of Internal Revenue before any suit can be maintained for a recovery of the tax paid, yet it is believed that the term 'appeal' is not used in the technical sense that there must be an appeal from the judgment of a lower tribunal to that of a higher for review or revision, but that the intendment of the statute is that the Commissioner of Internal Revenue shall be appealed or applied to in some regular way, and his decision had, as a condition to the prosecution of such suit or action," and hence it was said that the claim *or* abatement was "tantamount to an appeal to the Commissioner of Internal Revenue under the statute." But this view of the meaning of the term "appeal" seems to us to be contrary to that of the Supreme Court in Stewart v. Barnes and the Chesebrough case, supra.

It is doubtful whether under our system it can properly be assumed that one and the same person will pass upon the two classes of appeals. The point is illustrated by Stotesbury's case, in 146 U. S. 196, affirming 23 C. Cls. In that case there was an application to refund. Under the regulations prescribed by the Secretary, where the amount involved exceeded $250, the appeal, before it was finally decided, was required to be transmitted by the commissioner to the Secretary of the Treasury for his consideration and advisement. The commissioner, having examined the claim, transmitted the same to the Secretary along with other claims and with the statement "the
21 foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed and are transmitted to the Secretary of the Treasury for his consideration and advisement." Shortly thereafter the commissioner resigned and his successor was appointed. The Secretary returned the claim in

question to the successor "for reexamination, declining to consider them unless again submitted to your office." The question on appeal was whether the action of the first commissioner constituted a final award binding the Government. The Supreme Court recognized the right, under the statute, of the Secretary to make regulations and decided that the commissioner had taken no final action, holding that "the matter was one still pending until the action of Commissioner Douglass, on November 9, 1871, rejecting the claim." The case is also important in that it recognizes the necessity of an observance by the commissioner of the prescribed regulations in the matter of making entries upon his books.

We can not accept the ruling in the cases relied upon by plaintiff without departing from decisions of our own court and of the Supreme Court. Nor do we understand that the application for an abatement of the tax and its deniel can take the place of the necessary protest upon payment. Chesebrough case, 192 U. S. 253; New York & Cuba Mail S. S. Co., 200 U. S. 488; Hvoslef case, 237 U. S. 1. 9; Rand case, 52 C. Cls.. A cause of action for the erroneous or illegal assessment or collection of internal-revenue tax does not accrue before payment of the tax. An appeal for the abatement of the assessment may be authorized by law, but it is voluntary, and its rejection affords no basis for relief. The appeal for a refund, which can only be made after payment of the amount sought to have refunded, is not only authorized but is required, as a condition precedent to the maintenance of an action in any court for the recovery of the tax. And, as affects suits against the Government, the required decision by the commissioner upon the appeal becomes the more important in view of the suggestion in the Medbury case that the commissioner's findings of fact may be conclusive (173 U. S. 497). At any rate, the court should have the benefit of the commissioner's findings of fact. The regulations prescribed by the Secretary distinguish between applications for an abatement of the tax and for a refund of the tax, and upon the face of the regulation providing Form 47 is a notice that the filing of the claim for an abatement shall not prevent the collection, and that the collector should, if necessary, "collect the tax and leave the taxpayer to his remedy by claim under Form 46," and the regulation also provides that "claims for refunding of taxes and penalties must be made out upon Form 46."

Without passing upon the question of the plaintiff's liability to the tax, we rest our decision upon the question above discussed and hold that, not having appealed to the commissioner for a refund of the tax, the plaintiff has no right of action in this court. United States v. Savings Bank, 104 U. S. 728; Savings Institution v. Blair, 116 U. S. 200; Railroad Co. v. United States, 110 U. S. 543, 548; Public Service Co. v. Herold, 229 Fed. 902; Kaufman case, 96 U. S. 567.

It follows that the petition must be dismissed, and it is so ordered.

Judge Hay, Judge Downey, Judge Barney, and Judge Booth concur.

22 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Second day of December, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order adjudge and decree that the Rock Island, Arkansas and Louisiana Railroad Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the defendants, the United States; and, that the petition be and it hereby is dismissed; And it is further ordered, adjudged and decreed that the defendants, the United States, shall have and recover of and from the claimant, the Rock Island, Arkansas and Louisiana Railroad Company, the sum of Forty Dollars and sixty-three cents ($40.63), the cost of printing the record in said cause in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VI. *Claimant's Application for and Allowance of an Appeal.*

From the judgment rendered in the above entitled cause on the 2nd day of December 1918, in favor of the defendants, the claimant, by its attorney, on the 26th day of February, 1919, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

THOMAS P. LITLEPAGE,
Attorney for Claimant.
SIDNEY F. TALIAFERRO,
Of Counsel.

Filed February 26, 1919.

Ordered: That the above appeal be allowed as prayed for.
March 3, 1919.

BY THE COURT.

23 Court of Claims.

No. 33177.

ROCK ISLAND, ARKANSAS AND LOUISIANA RAILROAD COMPANY

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law and opinion of the court by Campbell, Ch. J.;

of the judgment of the Court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fourth day of March, A. D. 1919.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 27,025. Court of Claims. Term No. 939. Rock Island, Arkansas and Louisiana Railroad Company, appellant, vs. The United States. Filed March 26th, 1919. File No. 27,025.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. [redacted]82

ROCK ISLAND, ARKANSAS AND LOUISIANA RAILROAD COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT

THOMAS P. LITTLEPAGE,
SIDNEY F. TALIAFERRO,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 331.

ROCK ISLAND, ARKANSAS AND LOUISIANA RAILROAD COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT

STATEMENT OF CASE

The appellant, plaintiff below, filed a petition in the Court of Claims, December 15, 1915 (R. 1), for the recovery of Four Thousand Five Hundred and 13/100 Dollars ($4,500.13), together with interest thereon from December 26, 1913, at the rate of five per centum per annum, claiming that the same has

been improperly assessed and collected under the Act of Congress of August 5, 1909, entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States, and for other purposes;" in that the appellant was not, during the period for which the tax was assessed and collected, "doing business" within the meaning and intent of that Act.

The basis of the appellant's contention was that it was organized to do a railroad business and having by a lease (R. 5) executed January 31, 1906, transferred its entire right to operate the railroad property owned by it, for a period of 999 years, was not doing business.

An internal revenue tax was assessed in May, 1913, for the year 1912, of Four Thousand Two Hundred Eighty-five and 84/100 Dollars ($4,285.84) (R. 11), which amount, together with a penalty of Two Hundred Fourteen and 29/100 Dollars ($214.29) added, makes up the total of Four Thousand Five Hundred and 13/100 Dollars ($4,500.13), sued for. In June, 1913, appellant prepared and thereafter filed in due course, a claim for an abatement of the tax assessed (R. 11). Under date of December 18, 1913, the Commissioner of Internal Revenue rejected the application (R. 12).

After rejection of the application for abatement of the assessment by the Commissioner of Internal Revenue and payment of the tax by the appellant, no further steps were taken before the Commissioner of Internal Revenue looking to a refund of the tax paid (R. 13), and the appellant did not make a formal claim for refund as provided under the regulations of the Treasury Department, deeming the same unnecessary

as a matter of law. Thereafter suit was filed in the Court of Claims, as heretofore stated. The Court of Claims dismissed the petition, without passing upon the question of the plaintiff's liability to the tax, holding that the plaintiff had no right of action in that court because it had failed to follow its claim before the Commissioner of Internal Revenue for abatement, and its subsequent payment of the tax, by an appeal to the Commissioner of Internal Revenue for a *refund* of the tax. From that judgment the plaintiff appealed.

Assignment of Errors.

Appellant hereby assigns the following errors in the opinion and judgment of the Court of Claims:

1. That the Court erred in dismissing plaintiff's petition.

2. That the Court erred in finding as a matter of law that it was necessary for the plaintiff after having previously filed and had rejected a claim for abatement, to appeal to the Commissioner of Internal Revenue for a refund of the tax paid.

3. That the Court erred in not finding upon the entire evidence, that the plaintiff was not "doing business" during the year 1912, within the intent and meaning of the tax Act of Congress of August 5, 1909, and was not liable for the tax of Four Thousand Two Hundred Eighty-five and 84/100 Dollars ($4,285.84) assessed against it.

4. That the Court erred in not rendering judgment for the plaintiff against the defendant for the amount of the tax and penalty thereon, or a total of Four Thousand Five Hundred and 13/100 Dollars ($4,-

500.13), together with interest thereon, from December 26, 1913, at the rate of five per centum per annum.

5. For other errors appearing upon the face of the record.

Argument.

This case presents the following questions: (A) Was the appellant engaged in doing business within the meaning and intent of the Act of Congress of August 5, 1909, entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States, and for other purposes," and therefore liable for a tax thereunder?

(B) If the tax was improperly assessed and improperly collected, was it necessary for the appellant to appeal to the Commissioner of Internal Revenue for a refund of the tax paid, in view of the fact that a claim for abatement of the tax assessed had been seasonably presented to the Commissioner of Internal Revenue and rejected by him?

These questions we will endeavor to answer in turn.

The Appellant Company Was Not Doing Business in 1912.

The appellant is and was a consolidated railway corporation. The general objects and purposes for which it was established and the nature of the business to be carried on by it being that it should own, maintain, operate, improve and develop the constructed lines of railroads of the three constituent companies and to construct, or cause to be constructed, or to otherwise acquire and maintain certain designated lines of railroad, and to lease or to sell the lines of railroad of the consolidated company in whole or in part to other

companies and to lease or to purchase the railroads, appurtenances and franchises of any other railroad corporation, in whole or in part, etc. (R. 6.)

The appellant company was formed to do a certain kind of business, that of a railroad, its chief function being to transport persons and property. It could not do any other business than that for which it was created. It did not during the year 1912 do the business for which it was formed, but did

> "* * * let, lease, and demise, to the lessee, its successors and assigns: First. The following lines of railway of the lessor, * * * and all other lines of railway owned, leased, or operated by the lessor at the time of the execution and delivery of this indenture, or at any time during the term hereof, including spurs and branches to lumber mills, cotton compresses, and industries, and all rights, title, and interest now or at any time during the term hereof held by the lessor in and to any other lines of railway in which the lessor, by lease, trackage agreement, or operating contract, has any right, title, or interest; all rights of way, stations, depot and terminal grounds, and all other lands and interest in land appertaining or to appertain to said lines of railway and each of them; all road beds, tracks, sidings, rails, ties, switches, bridges, piers, abutments, trestles, viaducts, culverts, turnouts, turntables, superstructures, fences, stations, warehouses, elevators, water stations, telegraph lines, and all other building erections, fixtures, appliances, and facilities now owned or hereafter to be acquired by the lessor or hereafter added to said railways or any of them; all rolling stock and equipment of every description, including locomotives, cars, and vehicles of every kind now owned or possessed, or which may hereafter during the term be acquired

by the lessor; all tools, implements, and machinery, instruments, furniture, safes, books, accounts and bills receivable, cash on hand, stocks, bonds, maps, field notes, surveys, charts, materials, supplies, personal property, and claims or causes of action of every character now or hereafter during the term belonging or accruing to the lessor; together with all and singular the property, rights, privileges, franchises, tenements, hereditaments, and appurtenances to the said railways and each of them belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity of the lessor, in, and to the same, and every part and parcel thereof, with the appurtenances, whether now held or hereafter acquired * * *" (Record, pp. 5, 6).

Furthermore, the lessor, pursuant to the terms of the lease contract, broad enough, as indicated by the extract quoted to cover all of its property of every kind and description, did not have possession of the property. Therefore, we submit the appellant company could not possibly have been "doing business" within the intent and meaning of the act of August 5, 1909. The act provides in section 38 "that every corporation * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * *" (36 U. S. Stat. at Large, 112). This is clearly an excise tax, a tax on the doing of business

Manifestly the appellant corporation was and is either a live, legal entity or a nonentity, either through default in meeting the requirements of law as to its continued existence, or through being formally dis-

solved. We submit that it is the former—a live, legal entity, and in order to be and remain so it was obliged to and did hold stockholders' meetings, directors' meetings, elected officers (whether it had three or twenty officers was immaterial), and did all of the things necessary to maintain its existence. It was a consolidated railroad corporation organized to own and operate a railroad, but as it in fact had no railroad to operate, having leased it for 999 years, it was not in fact during the year 1912 doing business.

It is true that the appellant company did recover the sum of Two Hundred Thirteen and 90/100 Dollars ($213.90) in an action theretofore instituted based upon a covenant of warranty; did institute an action seeking the cancellation of certain tax assessments against the property of said company, and did purchase the railway lines of the Little Rock and Hot Springs Western Railroad Company for the price of Four Hundred Fifty-three Thousand Six Hundred Dollars ($453,600), for which amount it issued its promissory notes, thereby increasing its indebtedness to that extent (Record, p. 11), but these acts inured entirely to the benefit of the lessee, and it is respectfully submitted that they were not tantamount to operating a railroad—the transportation of persons and property—and could not by any reasonable construction of the act of August 5, 1909, be regarded as "doing business."

The questions presented in this case have already been considered in cases parallel to it, and in one or more of which the facts were almost identical. The courts have decided that the lessor railroad companies were not doing business.

Anderson *vs.* Morris, 216 Federal 83, was a suit

brought to recover tax assessed by the Commissioner of Internal Revenue against Morris and Essex Railroad Company under the act of August 5, 1909, which tax had been paid under protest, the railroad claiming it was not "engaged in business" or "carrying on or doing business," within the meaning of the act. The railroad company had leased all of its property to another company for a certain rental. It appears that the lessor company had during the tax year in question (1910) held a stockholders' meeting, directors' and executive committee meetings and elected officers. It executed and delivered to the lessee company One Million Four Hundred Thousand Dollars ($1,400,000) of bonds to reimburse it for amounts previously expended by it in construction work on the railroad property. The lessee company bought land and took title in the name of the lessor company and also sold land standing in the name of the lessee company using its name as grantor. The court said in part:

> "* * * The question therefore arises, whether upon this state of facts the tax was properly assessed upon the lessor company. Was the company in 1910 carrying on or doing business within the meaning of the Corporation Tax Act? The question of when a corporation is engaged in business or is 'doing business' within the meaning of a statute may depend to some extent upon the character of the statute. The courts have held in many decisions that a single transaction within a State by a foreign corporation is not a 'doing of business' in the State within the meaning of a statute which forbids a foreign corporation from doing business within a State until it has complied with certain requirements, provided the single transaction was done

by the corporation without an intent to engage in other acts of business within the State" (Citing Cooper Manufacturing Co. *vs.* Ferguson, 113 U. S., 727; Oakland, etc., Co. *vs.* Fred W. Wolf Co., 118 Federal, 239; Alpena, etc., Co. *vs.* Jenkins, 244 Illinois, 354; Ammons *vs.* Brunswick Co., 141 Federal, 570, and a number of other cases).

"* * * The fact that the lessor company retaining its primary franchise of corporate existence, maintained its organization, held an annual meeting of its stockholders, elected directors and amended the by-laws, and that its board of directors held a special meeting and elected officers and appointed an executive committee, cannot be regarded as doing business within the purview of the act, for it was simply keeping up the corporate organization, and surely no one can claim that the act of 1909 imposes any excise tax upon the primary franchise or maintenance of the corporate organization. There was nothing in all this that involved the exercise of any of the secondary franchises of the corporation. * * * This brings us to inquire whether the lessor company is to be regarded as 'engaged in business' because of its issuance of the bonds. * * *

"Under the terms of this lease the lessor corporation has practically gone out of business and was disqualified from any activity respecting the operation and management of the railroad business, which it had been incorporated to carry on. The issuance of the bonds was an act done simply to enable the lessee to enjoy, use, and exercise the property franchise, and rights which the lessor had previously demised and did not amount to a resumption of business which the lease had transferred or a 'doing of business' in the statutory sense. * * *"

New York Central and Hudson Railroad Company *vs.* Gill, 219 Federal, 184, was a similar case, in which

the lessor railroad company not only issued bonds but had on certain occasions taken steps in exercise of its right of eminent domain. The court held that because of the lease of all its property by the railroad company it was not "doing business" and was entitled to recover the tax paid under protest.

In Lewellyn *vs.* Pittsburgh, B. & L. E. R. Company, 222 Federal, 177, a case involving the same statute, the court held the collection of tax illegal, saying:

> "* * * The plaintiff railroad companies, the lessors, had disqualified themselves to carry on or do the business either of operating, managing or conducting transportation over the leased lines. What they did with the power they had left, namely, purchased and condemned property at another's request with another's money, for another's use, and for another's profit, was not in our opinion, a resumption by the lessor companies of the control, operation or business of the leased properties, and the particular acts done under the limitation of their reserve powers, did not amount to 'doing business' within the meaning of that expression as intended by the statute. * * *"

In McCoach *vs.* Minehill & S. H. R. Co. (the Minehill Case), 228 U. S., 295, it appeared that the lessor railroad company maintained its corporate existence and organization by the annual election of a president, board of managers and other officers. It received annually from the lessee company the fixed rentals called for by the lease and received annually sums of money as interest on its bank deposits. It also maintained a "contingent fund," from which it received annual sums as interest and dividends. It annually paid the ordinary and necessary expenses of its office and keep-

ing up its corporate existence, including the payment of salaries to its officers and clerks. It kept and maintained at its office stock books for the transfer of stock, and its stock was bought and sold upon the market.

The court held it was not "doing business" within the meaning of the act.

Zonne *vs.* Minneapolis Syndicate, 220 U. S., 187, and McCoach *vs.* Minehill, *supra,* were referred to and affirmed in U. S. *vs.* Emery, Bird, Thayer Realty Company, 237 U. S., 28.

In Traction Companies *vs.* Collectors of Internal Revenue (six cases), 223 Federal, 984, which involved the act being here considered, the court, carefully reviewing the decisions of the Supreme Court of the United States, stated in part:

> "* * * since the case was decided below, not only has the Supreme Court applied the rule of exemption in another instance—the Emery-Bird-Thayer case (237 U. S., 28)—but the very questions involved in this case have been decided in other circuit courts of appeals. The sale of a parcel of leased property and the purchase of other property, title to which was taken in the name of the lessor, but which was to be covered by the lease, were among the things done by the lessor company in the Gill case (219 Federal, 184), in the first circuit, but which were held not sufficient to precipitate the tax. The issue of bonds is not only covered by the Gill case and the Anderson case (216 Federal, 83), *supra,* but these cases in this respect are expressly approved by the Circuit Court of Appeals for the Third Circuit, in Lewellyn *vs.* Pittsburgh, etc., R. R. (222 Federal,

177). This last case, as also the Gill case, held that the lessor company is not to be engaged in business, even though it exercises, for the benefit of the lessee, its franchise right of eminent domain. Obviously, as the greater includes the less, these two decisions cover the case of such an injunction suit as was brought here against the steam railroad, if that suit did not in truth involve the exercise of the right of eminent domain; and if it did, we should yield to the concurring opinions in the other circuits whatever doubts we had on that subject. * * *"

The Court of Claims in Rio Grande Junction Railway Co. *vs.* U. S., 51 C. C., 274, held that the railway company was organized for the sole purpose of building a junction railway, leasing the same, collecting rents therefrom and distributing the same among its stockholders. The court found, as we understand the decision, that the claimant was in fact doing the business for which it was organized, and therefore liable to taxation under the act of August 5, 1909.

APPELLANT MADE A SUFFICIENT APPEAL TO THE COMMISSIONER OF INTERNAL REVENUE.

Section 3226, Revised Statutes of the United States, provides, in part

> "no suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or any sum alleged to have been excessive, or in any manner wrongfully collected, until appeal shall have been made to the Commissioner of Internal Revenue, according to the provision of law in that regard, and the regula-

> tions of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had thereon. * * *"

The question arises, is an appeal for abatement of an assessment, made before the actual payment of the tax, sufficient under the statute, or must a further and second appeal be prosecuted after the tax has been actually paid to the Government? We submit that the appeal for abatement of the assessment is entirely sufficient and has been so held in cases squarely upon the point, as follows:

In San Francisco and Loan Society *vs.* Cary, 2 Sawyer (U. S.), 333, 9th Circuit, the court said:

> "* * * the point made by the defendant is that the suit was prematurely commenced, on the ground that an appeal must be taken to the Commissioner after payment before suit brought (14 Stat. at Large, 111, 152, sec. 19, and regulations prescribed by the Secretary of the Treasury), but an appeal was taken from the assessment before payment, and decided against plaintiff. This I think sufficient. There could be no object in appealing a second time to the same officer in the same cause, and upon precisely the same question. The Commissioner has already decided the identical question, and the object of the law was accomplished in the first appeal. * * *"

In Schwarzchild v. Rucker, 143 Federal, 656, the court said:

> "* * * between the time the tax was assessed and its payment application was made to the Commissioner of Internal Revenue for an abatement of the tax, and this was refused.

> * * * The question made on demurrer to this item, is whether it is necessary, when there has been an application to the Commissioner of Internal Revenue for an abatement of the tax after it is assessed and before it is paid, to appeal after the payment of the tax for its refunding. * * * If the Commissioner considers the matter on its merits on an application for an abatement of tax before payment, and decides that the tax has been properly assessed and should be collected that there could hardly be any necessity for appealing to him to refund it. After a full investigation he has just held that it was legally assessed and directed that it be paid." Citing San Francisco, etc., Society *vs.* Cary, 2 Sawyer, 333.

In Weaver vs. Ewers, 195 Federal, 247, a similar case, the court said:

> "* * * notwithstanding, however, the provision of section 3226 above mentioned, * * * we are of the opinion that as the law does not require idle acts, the first ground of demurrer must be overruled, as the purpose and requirement of the statute above quoted has been fully met by the application for review of the assessment made to the Commissioner of Internal Revenue as set out in the petition. * * *"

The case of De Bary vs. Dunne, 162 Federal, 961, a case on the same point, was also decided in favor of the plaintiff and against the Government.

It is submitted that the appellant company was not "doing business" within the intent and meaning of the Act of August 5, 1909. It is also submitted that the law does not require an idle or a vain thing and that the appellant, in presenting and urging before the

Commissioner of Internal Revenue its claim for abatement of the tax assessed, should not have been under the law, and was not, obliged to follow the payment of the tax by a claim before the same officer of the Government, upon the same grounds, for a refund thereof.

Respectfully submitted,

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SUBJECT INDEX.

AUTHORITIES CITED.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

ROCK ISLAND, ARKANSAS AND LOUISIANA Railroad Company, appellant,
v.
THE UNITED STATES. } No. 82.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This is an appeal from the judgment of the Court of Claims dismissing a petition in which it was sought to recover taxes and penalties collected under what is known as the corporation tax law of August 5, 1909 (36 Stat. 112), which imposed on corporations "engaged in business in any State" a special excise tax, equivalent to 1 per cent upon the net income over and above $5,000, received from all sources during the year. The right of the Government to collect these taxes for the year 1912 was challenged alone, upon the ground that the corporation was not engaged in business during that year within the meaning of the statute.

THE FACTS.

The appellant is a railway corporation organized under the laws of the States of Arkansas and Louisiana by the consolidation in October, 1905, of three exist-

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ing railroad companies whose lines of railroads were thus acquired. According to its charter, or articles of agreement, the general objects and purposes for which it was established and the nature of the business to be carried on by it, were,—

> that it should own, maintain, operate, improve, and develop the constructed lines of railroads of the three constituent companies, and to construct, or cause to be constructed, or to otherwise acquire and maintain certain designated lines of railroad, and to lease or to sell the lines of railroad of the consolidated company in whole or in part to other companies, and to lease or to purchase the railroads, appurtenances, and franchises of any other railroad corporation, in whole or in part; to consolidate with any other railroad corporation or corporations; to hold, sell, and transfer the stocks, bonds, and securities of any other railroad corporation; to guarantee the stocks, bonds, and securities of any other railroad or terminal corporation; to construct and operate steamships and other vessels to carry freight and passengers for hire; to construct, own, and operate docks and wharves, and to possess, and enjoy and exercise all powers and privileges incidental to each and all of the objects and purposes set forth in the agreement. (Rec. p. 4, 5.)

Upon its organization it became the owner of seven separate lines of railroad, lying in the States of Arkansas and Louisiana. In January, 1906, it leased these lines of road to the Chicago, Rock Island and

Pacific Railroad Company for a term of 999 years, together with all other lines of railway owned, leased, or operated by the lessor at that time, or at any time during the term of the lease, including all equipment, railway stock, and other property owned or thereafter acquired by the lessor.

Under the terms of the lease the lessee agreed to pay as a rental each year (*a*) such a sum of money not to exceed $500, as shall be requisite to maintain, renew, and keep up during the term of the lease the corporate existence and organization of the lessor; (*b*) all taxes imposed, assessed, or levied upon the lessor, upon the demised premises, or upon the earnings thereof; (*c*) all rentals or other compensation, if any, due or owing by the lessor under the provisions of any lease, trackage arrangement, or operating contract for the use of the railway, or any part thereof of any other railway company; (*d*) an amount equal to the interest accruing on the bonds of the lessor then outstanding, or which should thereafter be issued by the lessor at the request or with the consent of the lessee; (*e*) an amount equal to the balance of the net earnings of the lines of railroad of the lessor after the payment out of the gross earnings thereof of the amounts enumerated in the foregoing paragraphs (*a*), (*b*), (*c*), and (*d*), and also all operating expenses and expenditures for such additional equipment, motive power, additions, improvements, and betterments to or upon the lines of railroad of the lessor as in the judgment of the lessee

shall be essential or convenient for the due and proper operation, maintenance, repairs, and renewals thereof.

And the lessor agreed to maintain, renew, and keep up during the term of the lease, its corporate existence and organization so long as permitted by law so to do, and at all times and from time to time during said term, when requested by the lessee, to put forth and exercise each and every corporate power and do each and every corporate act which the lessor may lawfully put in force or existence, to enable the lessee to enjoy and exercise every right, franchise, and privilege granted by the lease and the proper operation and management of the demised premises. (Rec. p. 5, 10.)

From the findings of fact it appears that during the year 1912, appellant maintained offices in the cities of Chicago, in Illinois; Ruston, in Louisiana; and Little Rock, in Arkansas; and that it held stockholders' and directors' meetings and elected officers who performed all the acts and functions usually and commonly delegated to and required of officers of railway companies in a situation analogous to that of appellant. In addition, during the year 1912 it purchased the railway lines of the Little Rock and Hot Springs Western Railroad Company at the price of $453,600, for which amount it issued its notes, thus increasing its indebtedness from $11,000,000 to $11,453,600. It also prosecuted a suit and recovered a judgment in an Arkansas court against one Morgan for $213.90, in an action based upon a covenent of warranty, and

instituted suit in a Louisiana court against the Board of Appraisers of the State of Louisiana, seeking the cancellation of certain tax assessments against its property. (Rec. p. 10, 11.)

Claiming that appellant had been engaged in business during the year 1912, an internal revenue tax of $4,285.84 was assesssd in May, 1913. In an effort to avoid the payment of this tax, appellant caused to be filed with the Commissioner of Internal Revenue at Washington, on July 16, 1913, a claim for an abatement of the assessment. This claim was on Form 47, provided by the Treasury Department for the making of such claims. The claim sought an abatement in part or in whole of the assessment, on the ground that appellant had not been engaged in business during the year in question "except the business of owning property, maintaining investments, etc.," and that it had no income, and for these reasons was exempt from the tax in question. Under date of December 18, 1913, the Commissioner of Internal Revenue rejected the claim, thus leaving the assessment, as made, in force. (Rec. p. 11, 12.) On December 26, 1913, the appellant paid to the proper collector of internal revenue the amount of the assessment, together with the interest and penalties, making the total amount paid $4,500.13, which amount was paid into the Treasury of the United States. The petition in the court below alleged that this payment was made under protest and with notice that suit would be brought to recover the amount paid. The

court, however, does not find that any such protest was made, or indeed, that the payment was made upon a demand by the collector, or under threat to seize appellant's property. (Rec. p. 13.)

After the payment of the above amount the appellant took no other steps or proceedings before the Commissioner of Internal Revenue looking to a refund of the tax or the payment back thereof to the appellant. (Rec. p. 13.)

On December 15, 1915, nearly two years after the payment, and without having made any appeal to or claim upon the commissioner for the refunding of the amount paid, appellant filed his petition in this case in the Court of Claims.

DECISION OF THE COURT BELOW.

After finding the facts as above set out, the Court of Claims rendered judgment against the appellant and dismissed his petition. The court held that, not having appealed to the commissioner after the payment of the tax, appellant could not maintain his suit, and, having reached this conclusion, expressed no opinion as to whether the appellant was in fact engaged in business during the year 1912.

THE GOVERNMENT'S CONTENTION.

The Government contends that the judgment of the court below was right for three reasons:

(1) The court could not grant appellant relief because after paying the tax it failed to appeal to the Commissioner of Internal Revenue for a refunding.

(2) Under the findings of the Court of Claims the taxes were paid by appellant voluntarily and not under protest. For this reason it would not be entitled to relief even if it had subsequently appealed to the commissioner.

(3) From the facts found it sufficiently appears that appellant was engaged in business within the meaning of the statute during the year 1912 and was therefore liable for the taxes collected.

LAW INVOLVED.

Congress has provided with great particularity the manner in which taxes illegally assessed or collected may be recovered and the conditions under which the courts may be resorted to for that purpose. The basic purpose of these laws is that the payment of taxes shall not be delayed by litigation over their validity, and that the courts shall not be open for the relief of the taxpayer until the taxes have actually been paid. Thus, section 3224 of the Revised Statutes provides that, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

When taxes have been paid, however, and it is claimed that these have been illegally exacted, authority is given under prescribed conditions for their repayment by the Commissioner of Internal Revenue. Until an unavailing effort to obtain relief from the commissioner has been made the courts are not open to the taxpayer.

Section 3220 of the Revised Statutes gives the Commissioner of Internal Revenue authority to correct errors in the assessment or collection of taxes as follows:

> The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; * * *.

Section 3228 limits the time within which a claim for the refunding of taxes under section 3220 may be filed as follows:

> All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two (2) years next after the cause of action accrued: * * *.

Section 3220 having provided that the Commissioner of Internal Revenue shall act in these matters subject to regulations prescribed by the Secretary of the Treasury, the latter has promulgated such regulations. These regulations provide for the abatement of an assessment, if found incorrect, before the payment of taxes and also for the refunding of taxes if

they have been paid. A different form is prescribed, according to whether the relief sought is an abatement of the assessment or the refunding of taxes paid. For the former, Form 47 was provided, which merely seeks the abatement or correction of an assessment. In this form of claim, being intended for use before the taxes have been paid, there is, of course, no demand for the refunding of taxes. On the contrary, the regulations expressly provide that the filing of such a claim, "does not operate as a suspension of the collection of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if necessary, collect the tax and leave the taxpayer to his remedy by claim on Form 46." (Rec. p. 12, 13.)

Form 46 is provided for claims for the refunding of taxes and, of course, seeks the repayment of taxes which have been paid. (Rec. p. 12, 13.)

Section 3226 of the Revised Statutes imposes a prohibition against the bringing of any suit to recover taxes paid without first pursuing the remedy provided by section 3220. It is as follows:

> No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commis-

sioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought without first having a decision of the commissioner at any time within the period limited in the next section.

The next section, 3227, provides that no such suit shall be maintained in any court unless brought within two years next after the cause of action accrued.

BRIEF.

The first question is, whether the appellant must be repelled from the courts because it has not complied with the conditions precedent to its right to sue. It is not denied, of course, that before a party who has paid taxes can maintain a suit for their recovery he must first comply with the conditions prescribed by the sections of the Revised Statutes above quoted, and the regulations lawfully made by the Secretary of the Treasury thereunder. It is admitted that, after the payment of the taxes, no effort was made to have them refunded by the Commissioner of Internal Revenue, and there is no finding by the Court of Claims that the payment was made under protest or otherwise than as a voluntary payment. It is a fact, however, that after the assessment was made and

before the payment of the taxes, a claim on Form 47 was filed by which it was sought to have the assessment abated in whole or in part. The contention in this regard, therefore, is narrowed to the question, whether a claim for abatement of the assessment can serve the purpose of a claim for a refund of the taxes so as to give the claimant a status in the courts, and the further question whether, even if the claim for abatement can serve such a purpose, a suit can be maintained when, after the rejection of the claim, the taxes have been paid voluntarily and without protest.

I.

A claim for abatement of the assessment is not an appeal to the commissioner for a refund of the taxes as required by the statute, and its rejection does not entitle the claimant to maintain an action in courts.

It will be observed that the statutes quoted do not purport to confer the right to bring suit in any event. On the contrary, they are express limitations upon any right to sue that then existed or might thereafter be conferred. The right to sue the collector had previously been conferred, and it has since been held that the right to sue the United States in the Court of Claims or in the District Court, with certain limitations, exists. The effect, therefore, of the statutes quoted and the regulations adopted thereunder is to prescribe the conditions with which the taxpayer must comply before he can resort to the courts for the recovery of taxes. The only recovery which he can have in any event is for

taxes paid, since it is expressly provided that no suit shall be brought to restrain either the assessment or the collection of taxes. The taxpayer is given the right to apply to the commissioner for an abatement or correction of the assessment. It is, however, wholly within the discretion of the commissioner as to whether the claim shall be allowed or rejected. If rejected, the only course open to the taxpayer is to pay the taxes and, under conditions prescribed, sue either the collector or the United States to recover them.

The sections of the Revised Statutes above quoted were first enacted, in substance, by the act of July 13, 1866, 14 Stat. 152. Prior to that time no authority to refund taxes was vested in the commissioner, and, in the *Collector* v. *Hubbard*, 12 Wall. 13, this court said:

> Prior to the passage of the act of the 13th of July, 1866, it is quite clear that the taxpayer, if he was illegally assessed, might maintain an action of assumpsit against a collector to recover back the amount, if he paid it under protest, although he had not taken any appeal to the Commissioner of Internal Revenue.

And speaking of the effect of the act of 1866, in the same case, at page 14, it was said:

> Suits for such causes of action are absolutely prohibited until the taxpayer shall appeal to the Commissioner of Internal Revenue, and until the appeal has been decided,

> unless the decision is postponed longer than six months, in which case he is at liberty to sue within one year from the time when his appeal was taken.

As we have seen, the commissioner is authorized, on appeal to him made, to pay back all taxes erroneously or illegally collected and that no suit can be maintained until this appeal has been made. No right of action can possibly arise until the taxes have been paid. The appeal to the commissioner, which will warrant the bringing of a suit, is an appeal for the repayment of the tax, or, in other words, a claim for the refunding thereof, and in order to be effective it is expressly provided that such claims must be presented to the commissioner "within two years *next after the cause of action accrued*" The grievance which can be the foundation of a suit is, therefore, the refusal or failure of the commissioner to repay taxes illegally collected, upon demand or appeal by the taxpayer. The wrong which the court will right consists of illegally failing to repay the money. In *Nichols* v. *United States*, 7 Wall. 122, 130, it was said:

> Thus it will be seen that the person who believes he has suffered wrong at the hands of the assessor or collector, can appeal to the courts; but he can not do this until he has taken an intermediate appeal to the commissioner, and, at all events, he is barred from bringing a suit unless, he does it within a year from the time the commissioner is notified of his appeal.

Moreover, by section 3220 of the Revised Statutes, the appeal which is necessary before a suit can be maintained must be made in accord with regulations prescribed by the Secretary of the Treasury. These regulations determine what must be done before the commissioner is authorized to act on the complaint. They authorize him to consider, before payment of the taxes, a complaint directed at the assessment, but expressly provide that the filing of such a complaint shall not, without more, prevent the collection of the tax as assessed. They do not authorize the commissioner to pay out any money already collected by him in the event he sustains the claim. On the contrary, these same regulations provide in effect, that before he shall refund any money collected, there must be an appeal or claim presented to him asking for such refund. This, in the very nature of things, can not be done until the taxpayer has paid the tax demanded, and it would seem impossible to treat any paper merely complaining of the assessment and filed before the taxes are paid, as an appeal or request to the commissioner to refund such taxes. That the effort of the appellant to treat his claim for abatement as an appeal to the commissioner for a refund of the taxes subsequently paid is unsound, is put beyond doubt by the case of *Savings Institution* v. *Blair*, 116 U. S. 200, 205. In that case, as in this, no effort was made to have the commissioner refund the taxes after they had been paid. It appeared that the taxpayer

made his return on the form prescribed by the Commissioner of Internal Revenue, but accompanied this return by an amended return in which it specifically set up the claim that an assessment according to the prescribed return would be illegal and that it was only liable to an assessment on the basis of the amended return, setting up fully the facts upon which this claim was based. After the payment of the tax which was assessed according to the prescribed return and paid under protest, it sued to recover, basing its suit upon the facts which had been set up in its amended return. Being met with the defense that its suit was premature because it had not appealed to the commissioner for a refund of the tax, it contended that in rejecting its amended return the commissioner had passed on the same questions that would have been involved in an appeal for refunding, and that, therefore, the claim, having been filed and acted on before the taxes were paid, should be treated as the appeal required by the statute. This contention was rejected, the court saying at page 205:

> We think there is no ground for this contention to rest on. No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid. It is not pretended that since the payment of the tax by the plaintiff any one of the steps required by the law and regulations to make an effectual claim for the refunding of the tax has been taken. All the safeguards

> prescribed by the Secretary of the Treasury for the protection of the public interests, in his regulations respecting claims for the refunding of taxes, have been disregarded. There has been no claim whatever in the sense of the law.
>
> In our opinion no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that, unless so presented, the right to demand the repayment of the tax is lost, and the commissioner has no authority to refund it, and, of course, the right of suit is gone. We regard the presentation of the claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the Government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the commissioner within the time and in the manner pointed out by law and relief has been denied him.

It was thus definitely decided that the commissioner had no authority to refund taxes unless a claim therefor had previously been presented to him; that there could be no claim for the refunding of taxes until after they had been paid; and that a claim previously presented complaining of the assessment was not such a claim as the law requires as a condition

precedent to suit. No later decision of the court has modified this clear and definite ruling. The only case claimed to have such an effect is *Dodge* v. *Brady*, 240 U. S. 123. In that case the court did say that, owing to the peculiar facts of the case, the action of the court below in ruling on the merits of the tax would not be reversed. There is nothing in the opinion, however, to indicate a departure from the rule of law announced in *Savings Institution* v. *Blair*, *supra*. The suit had originally been brought to enjoin the collection of taxes. Later, the taxes having been paid, a supplemental bill was filed seeking to recover them upon the ground that the act under which they were collected was unconstitutional. The defendant moved to dismiss the bill for want of jurisdiction because the suit was brought to enjoin the collection of a tax contrary to the statute and for want of equity, because the income-tax law was constitutional and valid. The court sustained the motion on the latter ground and dismissed the bill on the merits. The taxpayer appealed. The Government, of course, was satisfied with the judgment of dismissal. It appears that the taxpayer had filed "an appeal or claim for the remission and abatement of the said taxes" because of the unconstitutionality of the statute involved. The jurisdiction of the court was challenged upon the ground that it was a suit to enjoin the collection of a tax. It does not appear that in the lower court any contention was made that the court was without jurisdiction because

an appeal for a refund had not been made. Before this court decided the case the act in question had been held constitutional in another case. In this court, however, the Government seems to have insisted that the court below was without jurisdiction under the supplemental bill, since it failed to allege an appeal taken to the Commissioner of Internal Revenue after the payment of the tax. The determination of this question was wholly unnecessary, since to sustain the contention would not have been to reverse, but to affirm the judgment of the court below. On the other hand, to have decided it against the Government would still have resulted in an affirmance, since if the case was to be considered on its merits the judgment dismissing the bill was still proper. It would have been idle, of course, to have reversed the judgment merely upon the ground that the bill had been dismissed on the merits when it should have been dismissed for want of jurisdiction, and this manifestly was the view taken by the court when the contention was disposed of in this language at page 126:

> But broadly considering the whole situation and taking into view the peculiar facts of the case, the protest to the commissioner and his exertion of authority over it and his adverse ruling upon the merits of the tax, thereby passing upon every question which he would be called upon to decide on an appeal for a refunding of the taxes paid, we think that this case is so exceptional in character as not to

> justify us in holding that reversible error was committed by the court below in passing upon the case upon its merits, thus putting an end to further absolutely useless and unnecessary controversy. We say useless and unnecessary because on the merits all the contentions urged by the appellants concerning the unconstitutionality of the law and of the surtaxes which it imposes have been considered and adversely disposed of in *Brushaber* v. *Union Pacific R. R.*, ante, p. 1.

Clearly the necessity for an appeal for a refund made after the payment of taxes is recognized as essential to the jurisdiction of the courts. It was only the very exceptional character of the case that made it unnecessary to reverse the judgment. There is nothing exceptional in the present case. It is the ordinary, everyday case in which the taxpayer first makes his objection to the assessment and then after payment of the taxes sues to recover. It has, however, failed to give the commissioner opportunity to refund the taxes and, without this, no court has jurisdiction to give relief. A few cases in the Federal Reporter have been cited as sustaining the contention of the appellant. It is sufficient to say that these cases are in conflict with the decisions of this court already cited. In the case of *Hastings* v. *Herold*, 184 Fed. 759, District Judge Cross, deciding the precise question now involved, held in accordance with the Government's contention. His statement of the law and the reasons therefor, on page 764, is so clear and

convincing that we venture to close the discussion of this question by quoting:

> As already stated, however, the plaintiff herein sought to comply with the terms of section 3226, and made an appeal to the Commissioner of Internal Revenue for the abatement of the assessment, but not for the return of the moneys in question. The Secretary of the Treasury has provided two forms, Nos. 46 and 47, for the purposes just mentioned. Forty-six is made applicable to the return of taxes and penalties illegally or improperly assessed, and 47 for an abatement of their assessment. Form 46 is applicable to cases where the taxes and penalties have been paid, and 47 to cases where they have not been paid. These regulations of the Secretary have the force of law, and the Federal courts are obliged to take notice of them. (*Caha* v. *United States*, 152 U. S. 211, 221.) Furthermore, they are obviously binding upon the commissioner, and he obtains jurisdiction to pass upon a claim only when and as they have been complied with. The merits of a case come before him when a proper claim has been made. He never passed upon the merits of the plaintiff's claim as herein presented. Under the appeal presented and acted upon by him, he could only determine whether or not the assessment should be abated. Any other or further action would have been in violation of the regulations and beyond his jurisdiction. In *United States* v. *Savings Bank*, 104 U. S. 728, Form 46 was

recognized as appropriate where a return of taxes was sought. In *Hicks* v. *James Administratrix* (C. C.), 48 Fed. 542, the plaintiff brought suit to recover certain taxes which it was claimed had been illegally exacted, and the question as to whether there had been a proper appeal made to the commissioner, before the suit was instituted, was raised, and the difference between an appeal taken under Forms 46 and 47 clearly shown. The case was later affirmed by the Supreme Court sub nom. (*James' Administratrix* v. *Hicks*, 110 U. S. 272.)

II.

The taxes were paid voluntarily and not under protest and can not, in any event, be recovered.

The petition in this case alleged that the taxes had been paid under protest. The case went to trial on a general traverse and this allegation was, therefore, put in issue. There is no finding of fact that the payment was under protest or of any fact indicating that it was not entirely voluntary. The payment of the taxes must, therefore, be regarded on this hearing as having been voluntarily made. It follows that even if the claim for abatement of the assessment could be treated as a compliance with the statute, the appellant would still not be entitled to recover.

> Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention,

> or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and can not be recovered back. (*United States* v. *Cuba Mail S. S. Co.*, 200 U. S. 488, 494; *Railroad Co.* v. *Commissioners*, 98 U. S. 541; *Little* v. *Bowers*, 134 U. S. 547, 554.)

This is the rule which has always been applied to suits to recover money paid as taxes.

> Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. Where the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received. (*City of Philadelphia* v. *The Collector*, 5 Wall. 720, 731.)

There is no prescribed form of protest which is necessary, but it is essential that, in the absence of actual duress, there shall be a protest in some form. In the case of *Wright* v. *Blakeslee*, 101 U. S. 174, after calling attention to the requirement of the statute that in case of the illegal exactions of duties on imports the notice or protest must be given in writing, the court said at page 179:

> No such written notice or protest is required of a party paying illegal taxes under the internal revenue laws. He must pay under protest in some form, it is true, or his payment

> will be deemed voluntary. (*City of Philadelphia* v. *The Collector*, 5 Wall. 720; *The Collector* v. *Hubbard*, 12 id. 1.) But whilst a written protest would in all cases be most convenient, there is no statutory requirement that the protest shall be in writing. In the present case the court merely finds that the payment of the tax and penalty was made under protest, which may have been either written or verbal. We think that this finding is sufficient to show that the payment was not voluntary.

And in *Chesebrough* v. *United States*, 192 U. S. 253, which was a suit to recover money paid for stamps required by the internal revenue laws, the court said at page 264:

> As we have said the purchase of these stamps was purely voluntary, and if, notwithstanding, recovery could be had, it could only be on protest or notice, and there was none such here, written or verbal, formal or informal.

The judgment of the court below, therefore, should be affirmed, if for no other reason, because so far as the record shows the payment of these taxes was purely voluntary.

III.

Appellant was engaged in business during the year 1912 within the meaning of the statute.

If the Court of Claims had had jurisdiction of the case, the appellant, upon facts found, was not entitled to relief. No question is made as to the amount of the assessment, $4,285.84, which means, of course,

that the appellant had enjoyed during the year in question a net income of some $47,000. The sole claim on the part of appellant is, that it was not engaged in business during the year 1912. It was formed in 1905 by the consolidation of three existing railroad companies. The nature of the business to be carried on by it was described in its charter as owning, maintaining, operating, improving, and developing the lines of railroad acquired by the consolidation, and to construct or cause to be constructed, or to otherwise acquire other lines of railroad. Almost immediately upon its organization it leased to another railroad company all the lines of railroad it then owned with a provision that the lease should cover any after-acquired line. The lease did not provide for a fixed rental, but provided for the payment by the lessee of all the fixed charges of the lessor and in addition, an amount equal to the net earnings after paying these fixed charges and operation and maintenance expenses. In other words, the lessee company was to operate the railroads without profit to itself, all net earnings going to the lessor. Apparently the only advantage derived by the lessee from the operation of the leased railroads was such business advantages as might result from those railroads being operated in connection with its own line. It may well be doubted whether under the terms of this lease the lessee was anything more than an agent through which the lessor company chose to carry on its business, since the profitable operation

of the railroad would inure to the benefit of the lessor rather than the lessee. It may be conceded, however, that during the term of this lease the appellant was not engaged in maintaining or operating a railroad. It may be also that during most of the period of the lease it was not engaged in business within the meaning of this statute. If so, this was true not because it did not have the power to engage in business, but because it refrained from carrying on the business authorized by its charter. It had the authority at all times to carry on any part of the business authorized by its charter, and during any year in which it did this it was engaged in business and liable for this tax. The question is, whether it was so engaged during the year 1912. It has been held that if it did nothing more than the things necessary to preserve its corporate organization and to receive and distribute income derived from a lease of all its property, it would not be subject to the tax. It appears from the findings of fact, however, that during the year in question this company maintained offices in three different States and prosecuted law suits in the courts of two States, and the much more significant fact appears, that during that year it acquired the railroad of another company at a cost of nearly $500,000.

As shown above, one of the prime objects of the incorporation of this company, as indicated by its charter, was the business of constructing railroads or of purchasing or otherwise acquiring the railroads of other companies. Indeed, it fairly appears

from the record that from the beginning its principal business was the acquiring of railroads and bringing them into one system, to be operated by its lessee, the net earnings coming to it. It is conceded that the mere fact that it had the power to engage in this business during a given year would not make it liable for this tax. There may have been many years in which it did not engage in this business. But the only way in which it could enlarge its business and enhance its earnings was to either construct, purchase, or lease other railroads and turn them over to its lessee for operation. In 1912 it apparently saw an opportunity to thus increase its earnings, and went out and negotiated the purchase of a railroad. This, as we have seen, was expressly included in the business for which it was chartered. If it had been engaged during that year in the construction of a new railroad it would scarcely be contended by anyone that it was not engaged in the business which was one of the prime objects of its incorporation. It was exercising the same corporate powers and engaging in exactly the same kind of business when it was negotiating and finally consummated the purchase of an existing road. In the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, it was held that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, etc., were engaged in business within the meaning of the statute. It is claimed, however, that this case does not come within

the ruling in that case, but falls within the ruling in *McCoach* v. *Minehill Railway Company*, 228 U. S. 295. In that case the court held that the result of the leasing by a railroad company of all its railroad property was that it substantially went out of business, because it was not thereafter engaged in any business which was the prime object of its incorporation. Thus it was said at page 303:

> From the facts as stated above it is entirely clear that the Minehill Company was not, during the years of 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, which was the prime object of its incorporation. This business, by the lease of 1896, it had turned over to the Reading Company.

In the present case it is true that the appellant was not engaged in the business of maintaining or operating a railroad, but it was engaged in the business of acquiring other railroads, which manifestly was an important part of the prime object of its incorporation.

Moreover, the McCoach case was recognized as on the very border line. It was decided by a divided court, and the majority opinion, evidently considering that the corporation in that case had just about gone to the limit of what it could do without being engaged in business within the meaning of the law, was careful to say on page 305:

> It should be mentioned that there is nothing in the record to show that during the taxing

years in question the company exercised its power of eminent domain, or put in force any other special corporate power, in aid of the business of the lessee.

In the present case the company did, during the year 1912, put in force its special corporate power to acquire railroads by purchase. While this railroad, when acquired, was turned over to the lessee, and in that sense it may be said that the purchase was made in aid of the business of the lessee, it is also true that it added another railroad to those whose net earnings were to go to the lessor itself. In order to hold that this company was not engaged in business, and indeed the very business for which it was incorporated, it is necessary to say that when it chooses to commit to a lessee the actual operating of the railroads which it owned, it is refraining from doing the business authorized by its charter, although it may continue to engage in the business of constructing, purchasing, or leasing railroads at will.

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment of the Court of Claims should be affirmed, both because that court was without jurisdiction and because the appellant is not entitled to relief on the merits.

WILLIAM L. FRIERSON,
Solicitor General.

W. MARVIN SMITH,
Attorney.

AUGUST, 1920.

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ROCK ISLAND, ARKANSAS & LOUISIANA RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 82. Submitted November 8, 1920.—Decided November 22, 1920.

The right to sue for the recovery of an internal revenue tax illegally assessed is conditioned upon prior appeal to and decision by the Commissioner of Internal Revenue, which means an appeal, after payment, for a refund, and is not satisfied by an appeal or application for abatement of the tax before it was paid. Rev. Stats., §§ 3226 (as amended), 3220, 3228, construed. P. 142.

54 Ct. Clms. 22, affirmed.

THE case is stated in the opinion.

Mr. Thomas P. Littlepage and *Mr. Sidney F. Taliaferro* for appellant.

The Solicitor General for the United States. *Mr. W. Marvin Smith* was also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for a sum paid as an internal revenue tax under the Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112. It is alleged that the claimant was not engaged in or doing business in the year for which the tax was collected and that therefore it was not due. The Court of Claims dismissed the petition on the ground that the claimant had not complied with the conditions imposed by statute and the claimant appealed to this Court.

The facts are simple. After the tax was assessed a claim for an abatement was sent to the Commissioner of Internal Revenue in July, 1913. On December 18 of the

same year the Commissioner rejected the application, whereupon on December 26 the claimant paid the tax with interest and a penalty. So far as appears there was no protest at the time of payment and it is found that after it nothing was done to secure repayment of the tax. By Rev. Stats., § 3226, amended by Act of February 27, 1877, c. 69, § 1, 19 Stat. 248, no suit shall be maintained in any Court for the recovery of any tax alleged to have been illegally assessed "until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*," etc. Regulations of the Secretary established a procedure and a form to be used in applications for abatement of taxes and distinct ones for claims for refunding them. The claimant took the first step but not the last.

By Rev. Stats., § 3220, the Commissioner of Internal Revenue is authorized "on appeal to him made, to remit, refund, and pay back" taxes illegally assessed. It is urged that the "appeal" to him to remit made a second appeal to him to refund an idle act and satisfied the requirement of § 3226. Decisions to that effect in suits against a collector are cited, the latest being *Loomis* v. *Wattles*, 266 Fed. Rep. 876.—But the words "on appeal to him made" mean, of course, on appeal in respect of the relief sought on appeal—to refund if refunding is what he is asked to do. The words of § 3226 also must be taken to mean an appeal after payment, especially in view of § 3228 requiring claims of this sort to be presented to the Commissioner within two years after the cause of action accrued. So that the question is of reading an implied exception into the rule as expressed, when substantially the same objection to the assessment has been urged at an earlier stage.

141. Syllabus.

Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. *Lex non præcipit inutilia* (Co. Lit. 127*b*) expresses rather an ideal than an accomplished fact. But in this case we cannot pronounce the second appeal a mere form. On appeal a judge sometimes concurs in a reversal of his decision below. It is possible as suggested by the Court of Claims that the second appeal may be heard by a different person. At all events the words are there in the statute and the regulations, and the Court is of opinion that they mark the conditions of the claimant's right. See *Kings County Savings Institution* v. *Blair*, 116 U. S. 200. It is unnecessary to consider other objections that the claimant would have to meet before it could recover upon this claim.

Judgment affirmed.